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PAMPHLET BINDER
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OPINION

OF THE

HON. S. F. PHILLIPS,

SOLICITOR-GENERAL OF THE U. S.,

Relating to and CONFIRMING the Right of

THE CENTRAL BRANCH UNION PACIFIC
R. R. COMPANY.

To continue and extend its road from the meridian of Fort
Riley to a connection with the Main Trunk, the Union
Pacific Railroad, at the One-hundredth meridian.

DEPARTMENT OF JUSTICE,

WASHINGTON, January 10, 1873.

SIR: I have considered with care the question, Whether the Central Branch Union Pacific Railroad Company has the right to file a map with a view of constructing that part of the Pacific railroad described in the act of 1862 (section 9) as lying between the meridian of Fort Riley and the One-hundredth meridian; and I submit the opinion that the acts of July 1, 1862, and July 2, 1864, in relation to the Pacific railroad, in the events which subsequently happened, conferred that right; and also that such right has not been divested by the act of July 3, 1866.

The importance of the question requires that the reasons for this conclusion shall be stated at length.

I will at the outset state certain principles which have been assumed in the course of the argument.

I. The will of the United States in the acts of 1862, 1864, and 1866, so far as it is to be sought elsewhere than in their language, is to be determined by the state of things that existed in those years. It may be, that in the interval public policy upon the subject-matter of these acts, or upon important features therein, has, for good reasons, been changed. It may be, that the general obscurity and apprehension which hung around the enterprise of constructing a railroad of such magnitude, so located, and in many important respects so wholly without precedent, have in great measure disappeared; but we must go back of such matters, and become, so far as we can, *cotemporaneous* with the transactions under consideration.

II. In making out a plan for constructing the Pacific railroad, Congress was under the necessity of leaving the route undetermined. In some cases maps of the *general route* were required from the companies proposing to co-operate in the construction of the road (1862, section 7), and in others an *actual survey* was to be submitted to the President (section 9); but prudence obviously required all the *details* to remain open to an extent much greater than in other legislation upon similar subjects. Whenever such details were fixed subsequently, under machinery provided for in the acts, I have considered that they became incorporated into the acts as much as if originally therein expressly set forth.

For instance, under the words of the act of 1862, it was doubtful whether The Central Branch Company could, within one hundred miles of the Missouri river, have connected its road with that of the company whose road was to run from the mouth of the Kansas; yet when, in July, 1865, it had been made to appear, by surveys or otherwise, that such connection could be made, it was the same as if an absolute requirement to that end upon this company had existed originally in the

act; and, therefore, if relying upon that, The Central Branch Company determined an election given to it by that act, and chose to involve its fortunes with those of the Pacific railroad, a contract arose between the United States, The Kansas Company, and The Central Branch Company, from which any uncertainty on the face of the act as to the point of connection was entirely excluded.

III. That Congress has expressly reserved to itself the power of repealing the acts of 1862 and 1864 does not withdraw any action by it, looking in that direction, from examination by the ordinary rules of right and wrong, and therefore leaves open to every consideration drawn from this quarter, that in the absence of such reservation would have been applicable, the question, Whether, in a particular instance, where the supposed repealing act uses only general expressions, and its application is matter of argument only, it is probable that Congress did intend such repeal. With or without such reservation, it is always true that when the United States, which is the great exemplar of public faith upon this continent, enters into engagements, it does so upon the footing of other people, except so far as regards the machinery for enforcing the obligation. Being itself the very breath of life to the whole system for administering justice between others, it necessarily carries with it the characteristics of that life wherever it appears, even in the absence of its ordinary outward and visible signs of judges and juries. Upon the extent to which the reservation in question might authorize Congress to go, it may not be wise or even decent to speculate, just as ordinary speculations, Whether certain things are within the competency of *Omnipotence*, are generally unfruitful and impertinent. For instance, the act of 1862 provides that where a company shall have finished a certain section of its road, commissioners shall be appointed by the President to ascertain and report upon the fact, and thereupon Bonds and Patents for land shall be issued. Would it be decent to speculate upon the effect of a repeal of this act in the interval between such completion and issue? Without deciding this, we may say that it would be quite as

decent as to entertain a supposition, that after one of the companies authorized by the act had been put to large expense in constructing its part of the road, Congress had repealed the act, either wholly, or so far as to have the effect of leaving one terminus of such road, as it were, projecting *in air*.

I cannot, therefore, accede to the suggestion that the act of 1866, which does not mention The Central Company, and which has the full effect desired by its *promoters* in relieving the Kansas Company from certain complications, amounts to a repeal of the engagements constituted by the acts of 1862 and 1864 between the United States and the first-named company.

I will now state the facts in the case as they have been presented to me, and such statements will so develop the argument as to leave little to be said in conclusion.

1. By the acts of 1862 and 1864, five railroad companies were named as *authorized* to contribute to the construction of a railroad between the Missouri and the Pacific ocean. The Union Pacific Company was *created* by the act (section 1) for this purpose, and with it were to be united, if they chose, The Leavenworth, Pawnee, and Western, The Central Pacific (section 9), The Hannibal and St. Joseph, and the Pacific Railroad Company of Missouri (section 10).

2. The general plan of the road was, that from the Pacific coast to a point on the one-hundreth meridian west from Greenwich the route was a single one, but that eastward of that point it should branch off into a delta, as it were, with its various *termini* at specified points on the Missouri.

3. The road, including its branches, was to be ONE, in the sense that the contributory companies were required to operate and use it as one continuous line, with equal advantages and facilities as to rates, time, and transportation, and without any discrimination of any kind in favor of or against the road or business of either of them, the gauge being the same throughout. (Acts of March 3, 1863, and 1864, section 15.)

4. By the act of 1862 each of certain specified portions of the route were assigned for construction to each of certain

designated companies; and by the 16th section of the act of 1864, which contains the matured views of Congress upon this topic, it was provided [1] that two or more of these companies might *consolidate* for the purpose of constructing their portions by joint effort; [2] if, when such consolidated organization had completed its road, any other of the companies should not have constructed the number of miles of its road within the required time, such organization might continue the construction of its road in the general direction and route upon which the incomplete road was authorized to be built, until it should meet the constructed road of said company; and [3] in case any of said companies should not enter into such consolidated organization, it might, upon the completion of its road, continue the same, under like circumstances and provisions.

5. The road was to be constructed in certain sections and with certain aid, and as any section was completed, the President, on application, was to appoint commissioners to view and report, and upon their report Bonds and Patents for lands were to be issued. (Act of 1862, sections 4 and 5.) These provisions applied to all the companies; and also to the plan of construction in section 16, above. So, also, they applied to the assignees of such companies. (Act of 1862, section 15.)

6. It is necessary here to speak only of The Hannibal and St. Joseph, The Leavenworth, Pawnee, and Western (called in the act of 1866 The Union Pacific Railway Company, Eastern Division), and The Central Branch Union Pacific Railroad Companies; and, for convenience, I will call the two latter The Kansas Company and The Central Branch Company.

7. It is admitted that The Central Branch Company is the assignee of whatever rights were conferred by this legislation upon The Hannibal and St. Joseph Company, and that the charter of The Central Branch Company by The State of Kansas manifested the assent of that State as required in sections 10 and 13 of the act of 1862.

8. The Kansas Company, in accordance with the provisions of the act of 1862 (section 7) and 1864 (section 5), by the

terms and conditions of which it was bound (act of 1862, section 9), on the first of July, 1865, filed a map designating its general route, and electing to unite with the main route at *its* eastern terminus on the One-hundredth meridian, and thereupon, The Central Branch determined the election allowed to it by the acts, and bound itself to take its part in the general work.

9. By the acts of Congress, and the action of the parties, the condition of things after this determination and up to the time of the passage of the act of 1866, was, that The Central Branch had a right, *primarily*, to construct that part of the Pacific road which lay between Atchison and the point within one hundred miles west thereof, where it would connect with the part of that railroad that was *primarily* to be constructed by The Kansas Company; and, as a right *secondary* to that of the Kansas Company, it might extend its part of that railroad so as to connect with that portion of it which should be found at the One-hundredth meridian. In that condition it is clear, by the 16th section of the act of 1864, that, although The Central Branch Company had reason to hope that in order to make its road a part of the great Pacific road it would be necessary to involve its capital only so far as would be required by a route short of one hundred miles in length, yet it had also to contemplate the contingency of a failure by The Kansas Company to supply the link in the great chain on which that hope was based, and in that event could rely upon a *distinct promise that it might supply that link itself*.

Indeed, so flexible was the machinery in this respect, that under the provisions of the 16th section any one of the authorized companies might in the event have constructed the whole railroad. The right of constructing any portion of the road, although primarily vested in one of such companies, was, *secondarily*, a right of every other of them. In this respect the organization was "vital in every part."

10. The Kansas Company did not take the steps in relation to its route west of the meridian of Fort Riley, specified in the act of 1862, section 9; and, *at its promotion*, upon the 3d

of July, 1866, an act was passed allowing it further time to file a map of its *general route*, providing, however, that it should connect with the Union Pacific Railroad at some point not more than fifty miles west of the meridian of Denver. Under this act, and others subsequent thereto, The Kansas Company has filed another map and proceeded thereunder to construct a road deflecting far to the south of its former route.

11. Thereupon the Central Branch Company seeks to comply with the provisions of section 9 above, and thereby raises the question before me.

To this claim by the Central Branch Company objection is made, on the ground that certain conditions, specified in the 16th section of the act of 1864, have not been performed.

First. That The Central Branch Company has not *completed its road*.

The fact is, that it has completed a road from Atchison to a point upon the general route of that part of the Pacific railroad that was to be constructed by The Kansas Company, under its map of July 1, 1865. Its western terminus was *primarily* to be a point in that *general route*. Whenever it had reached a point at which its *secondary* rights of construction commenced, it had, within the meaning of that section, completed *its road*.

Secondly. It is said that the 16th section, in denoting the company to whose rights of construction the "consolidated organization" or some other "company" might succeed, uses the expression, "defaulting" company, and that this quality cannot be ascribed to a company that has been permitted by the United States to substitute another performance for that originally promised; that since the act of 1866 The Kansas Company is in no default as regards the route between the meridian of Fort Riley and the One-hundredth meridian.

It may be doubted whether it is allowable to apply ordinary definitions of the meaning of adjectives to cases in which the adjective, with the prefix "said," is used to refer to a

quality or characteristic which has already in the context been defined at length. It can only mislead if we refer to *general rules* as to the *usus loquendi*, when the writer, whose meaning is in question, has laid down a *special rule* as to his meaning, in the very passage under consideration. Here, for instance, the first mention of that company in the stead of which another company or organization might act, is, such as "shall not have constructed the number of miles of its road within the time herein required." Afterwards it is referred to several times in the same section as "said defaulting company." It seems that as of course the "default" is, "not having constructed," &c., no matter why.

But the case here may be put in a form even stronger. After the filing of the map of July 1, 1865, and the subsequent election of The Central Branch Company, the United States, The Kansas Company, and The Central Branch Company were all parties to a contract by which, amongst other things, The Kansas Company stipulated that at the end of a road of less than one hundred miles in extent, The Central Company should find the Pacific railroad to connect with. I apprehend there is no principle of law by which two of these parties could, against the will of the third, rescind such contract; and that before any tribunal in which the United States, by its agents, construes and enforces these relations, "defaulting" would be regarded as a fit word to designate him, who, after such partial rescission, should disappoint the expectations of the protesting partner based on the original undertaking. I do not see why one agent of the United States should not be as precise and accurate in its use of words as another, or why Congress should differ from the highest judicial authority of the land in its conception of the obligation of a contract.

In the above statement of facts and principles, I have laid out of view every fact that has seemed to me of minor importance.

Upon the whole, from the course of legislation and the conduct of the parties, I entertain no doubt that at the time of the passage of the act of 1866 a trilateral contract existed between the United States, The Kansas Company, and the Cen-

tral Branch Company; that by such contract it was contemplated that The Kansas Company by non-action might yield its right to construct a road from the meridian of Fort Riley to the One-hundredth meridian, and that in that case such right would devolve upon The Central Branch Company; and that the act of 1866 in withdrawing The Kansas Company from this engagement, and setting it up, with advantages personal to itself, in other business, did no more, as regards the Central Branch Company, than ascertain, and perhaps accelerate, the event upon which its secondary rights were to accrue.

I am, sir, with great respect, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The PRESIDENT.

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